Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1803

THE DIVISION OF BEVERAGE, DEPARTMENT OF BUSINESS REGULATION, an agency of the STATE OF FLORIDA,

Petitioner,

v.

BONANNI SHIP SUPPLY, INC.,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

****

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ROBERT V. WILLIAMS of
GIBBONS, TUCKER, McEWEN
SMITH, COFER & TAUB
A Professional Association
606 Madison Street
Post Office Box 1363
Tampa, Florida 33601
(813) 228-7841

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT ERRED IN HOLDING THAT THE STATE'S REGULATORY SCHEME FOR EXPORTERS OF ALCOHOLIC BEVERAGES CREATED AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with Petitioner's statement of the constitutional and statutory provisions involved in this case except that Respondent submits that the following statutory provisions were also materially involved in the decision under review.

FLORIDA STATUTES

Fla. Stat. §561.37 (1975) (Vol. 2, 1975 Florida Statutes, pages 941-42)

Section 561.37 Bond for payment of taxes.

. . . Each exporter shall file with the division a surety bond acceptable to the division in the sum of five thousand dollars as surety for the payment of all taxes; provided, however, that where in the discretion of the division the amount of business done by the exporter is of such volume that a bond of less than five thousand dollars will be adequate to secure the payment of all taxes assessed or authorized by the beverage law, the division may accept a bond in a lesser sum than five thousand dollars, but in no event shall it accept bond of less than one thousand dollars.

Fla. Stat. §561.41 (1975) (Vol. 2, 1975 Florida Statutes, page 942)

Section 561.41 Maintenance and designation of principal office by manufacturers, distributors and exporters.

Each manufacturer, distributor and

exporter licensed shall have within this state an office designated as its principal office within this state and may maintain branch offices within or without this state. The principal and branch offices within this state shall during regular defined business hours be kept open for the inspection of authorized employees of the division.

Fla. Stat. §561.55 (1975) (Vol 2, 1975 Florida Statutes, page 944-45)

Section 561.55 Manufacturers', distributors' and exporters' records and reports. -

(1) Manufacturers, distributors and exporters shall each keep a complete and accurate record and make reports showing the amount of beverages manufactured or sold within the state and to whom sold; also of all beverages imported from beyond the limits of the state and to whom sold; also all beverages exported beyond the limits of the state, to whom sold, the place where sold and the address of the person to whom sold. Manufacturers, distributors and exporters shall make full and complete report by the tenth day of each month for the previous calendar month. Said report shall be made out in triplicate, two copies of which shall be sent to the division, the third copy retained for the manufacturer's, distributor's or exporter's record. Reports shall be made on forms prepared and furnished by the division.

(2) All manufacturers, distributors and exporters licensed under the

beverage law shall maintain and keep for a period of three years at the licensed place of business such records of alcoholic beverages received, sold or delivered within or without this state as may be required by the division.

STATEMENT OF THE CASE

Respondent agrees that the Petitioner's Statement of the Case is substantially correct except that Respondent rejects certain implications which may be drawn from Petitioner's Statement and would augment the Statement of the Case as set forth below.

First, Respondent disputes Petitioner's implication that this case simply involves the State of Florida's right to require the Respondent to hold an exporter's license pursuant to Section 561.14(4), Florida Statutes. The Complaint filed by the Respondent in the trial court challenged the right of the state to require Respondent to file monthly reports and otherwise regulate Respondent's business through the licensing procedure.

Secondly, Petitioner's Statement of the Case implies that the Respondent did not timely raise the issue of the State's right to impose regulations on the Respondent's business under the Commerce Clause. There is no question that this issue was raised before the trial court as reflected in the final summary judgment entered by that court (Petitioner's Appendix pp. 14-15), and it was the sole issue considered by the Supreme Court of Florida on appeal. (Petitioner's Appendix pp. 17-24).

Lastly, Respondent wishes to include within the Statement of the Case the Florida Supreme Court's holding that:

> Section 561.14(4), which requires exporters such as Bonanni to obtain a license and to comply with the bonding, filing, and inventory

requirements we have described, violates the Commerce Clause of the United States Constitution and is invalid. (Petitioner's Appendix p. 24)

ARGUMENT

THE FLORIDA SUPREME COURT DID NOT ERR IN HOLDING THAT THE STATE'S REGULATORY SCHEME FOR EXPORTERS OF ALCOHOLIC BEVERAGES CREATED AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Although Petitioner divides its argument for granting the writ into two separate questions, the only issue involved in this case is whether the Florida Supreme Court's decision, holding that the state's regulatory scheme for exporters violates the Commerce Clause, is in accord with the prior decisions of this Court. For convenience, however, Respondent will attempt to dispose of Petitioner's arguments in the order in which they are raised in the Petition.

A. THE FLORIDA SUPREME COURT DID NOT DEPART FROM PRIOR DECISIONS OF THIS COURT IN HOLDING SECTION 561.14(4) UNCONSTITUTIONAL AS VIOLATIVE OF THE COMMERCE CLAUSE.

Petitioner's first argument is basically that Section 561.14(4) of the Florida Statutes is nothing more than a state license classification statute and that the state has the power to require such a license under the rationale of prior decisions of this Court. E.g., United States v. State Tax Commission of Mississippi, 412 U.S. 363 (1973); Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324 (1963). This argument, however, proceeds upon the

faulty assumption that the Supreme Court of Florida was considering only the question of whether the state could constitutionally require Respondent to hold an exporter's license. A brief examination of the opinion rendered by the Florida Supreme Court in this case shows that this assumption is incorrect.

In its opinion, the Florida Supreme Court framed the issue it was considering as follows:

> The ultimate question we are called upon to answer is whether the state's supplementary regulations, as set forth in Chapter 561 of the Florida Statutes, constitute an unreasonable burden on interstate commerce within the limitations established by the federal courts. (Petitioner's Appendix, pp.20-21)

The supplementary regulations specifically referred to by the Florida Supreme Court consisted of a $500 license fee pursuant to §561.14(4), Florida Statutes; a $5,000 bond to protect against tax loss if bonded liquor is diverted into state commerce pursuant to §561.37, Florida Statutes; monthly reports of the transfer of liquor into and out of the bonded warehouse pursuant to §561.55, Florida Statutes; and semi-annual physical inspections of the bonded warehouse pursuant to §561.41, Florida Statutes. The reason that §561.14(4) became the focal point of this litigation is that Respondent is subject to all of the other regulatory requirements of Chapter 561 simply because Respondent must obtain an exporter's license pursuant to §561.14(4). It is the fact that Respondent holds the

license that automatically triggers the operation of the rest of the state's regulatory scheme.

Petitioner contends that §561.14(4) "does no more than permit the state to identify those persons authorized to warehouse and transport" in-bond liquor and that the Florida Supreme Court has misapplied the doctrine of undue burden upon interstate commerce in striking down this simple classification statute (Petition p. 7). This argument, however, ignores the facts of this case and the holding and reasoning of the Florida Supreme Court. The holding of the Florida Supreme Court was that:

> Section 561.14(4), which requires exporters such as Bonanni to obtain a license and to comply with the bonding, filing and inventory requirements, we have described, violates the Commerce Clause of the United States Constitution and is invalid. (Petitioner's Appendix p. 24).

Thus, the lower court did not hold, as Petitioner contends, that a simple license classification statute was unconstitutional. Rather, it was the entire regulatory scheme which the Florida Supreme Court found to be objectionable. Indeed, this interpretation of the lower court's opinion is bolstered by the fact that the Florida Supreme Court expressly recognized that its decision did not prohibit the state from requiring exporters to register with the state for identification purposes. (Petitioner's Appendix p. 24).

Therefore, since the Florida Supreme Court's decision was grounded on a consideration of the state's extensive regulation of Respondent's in-bond liquor business, and was not a determination that the state could not license Respondent for identification purposes, the decision of the Florida Supreme Court is not in conflict with prior decisions of this Court authorizing the use of license classification procedures.

B. THE FLORIDA SUPREME COURT HAS NOT ANNOUNCED A NEW TEST FOR DETERMINING WHETHER STATE REGULATION VIOLATES THE COMMERCE CLAUSE.

Petitioner contends that the Florida Supreme Court, in rendering its present decision, did not apply the traditional commerce clause test of whether state regulation constitutes an undue burden on interstate commerce. Rather, Petitioner argues that the lower court has "blurred the distinction between the test for an undue burden on interstate commerce and the doctrine of federal preemption", and has announced the new test of "whether there was duplicative federal regulation". (Petition p.8). Again, an examination of the Florida Supreme Court's opinion in this case shows that Petitioner's contention is incorrect.

Initially (in its opinion) the Florida Supreme Court couched the issue in this case in terms of the traditional Commerce Clause test by stating:

> The sole issue for review is whether the state's regulation of Bonanni's import-export activity constitutes an un-

> reasonable burden on interstate commerce under the federal constitution (Petitioner's appendix p. 18).

After recognizing the state's legitimate police power objective of preventing diversion of in-bond liquor into in-state commerce, and after considering the extensive federal regulation of Respondent's business, the Florida Supreme Court relied on Epstein v. Lordi, 261 F. Supp. 921 (D.N.J. 1966), aff'd per curiam 389 U.S. 29 (1967), to hold that the state's regulatory activity was not reasonably necessary to accomplish the state's objective of preventing diversion. The lower court did not hold, as Petitioner contends, that state regulation must always fall in the face of federal regulation. Rather, the lower court held that, on the facts of this case in light of the pervasive federal regulation of Respondent's business, the state regulation was unnecessary, and therefore, constituted an unreasonable burden on interstate commerce. Obviously, this decision was rendered in accordance with prior case law setting forth the traditional Commerce Clause test.

This conclusion is mandated by a consideration of Epstein v. Lordi, supra, which was heavily relied upon in the Florida Supreme Court's opinion. In Epstein, the court considered a factual situation which was closely akin to the present case. In that case, New Jersey had attempted to extensively regulate an in-bond liquor business which was also heavily regulated by the federal government. The Epstein court recognized as did the Florida Supreme Court in the present case, that the issue before it was whether the state regulation was reasonably necessary in light of comprehensive federal regulation. As the Epstein court recognized:

> [T]he significance of the Federal scheme lies in the fact that it delineates both the local and the national interests which must be weighed in assessing the "reasonable necessity" of the burden imposed by the wholesale license requirement. In other words, the court must determine whether the burden imposed on foreign commerce, and on the national interest therein, is justified by "the character of the local interests and the available means of protecting them". 261 F. Supp. at 936-937.

The local interest recognized by the Epstein court was the same as that in the present case - the prevention of diversion. This is the legitimate state interest, but as the Epstein court noted, to the extent that the federal regulatory scheme minimized the danger of diversion it likewise reduced the justifiable scope of state regulation. 261 F. Supp. at 937. In Epstein, the court concluded that the comprehensive federal regulation was ample to protect against diversion and therefore the state regulation was unnecessary to accomplish the state objective and constituted an unreasonable burden on interstate commerce.

This same conclusion was obviously drawn by the Florida Supreme Court in the present case. In holding that the state's regulatory scheme violated the Commerce Clause, the court below reasoned:

> Obviously, the license fee and bonding requireme provide no protection for the state against diversion. Similarly, the filing of monthly reports offers

> nothing to the state which the federal government does not already have; indeed, Bonanni attaches to the state's form each month a copy of the report it files with the federal government for the same purpose. The one state activity that has no counterpart in the federal scheme of regulation is the semi-annual physical inventory. Since we discern no information regarding diversion that might emerge from the state's physical inventory which would not also be revealed by the paper and physical inventories provided by the federal government, we must conclude that the state's attempt to monitor for diversion is merely duplicative of the federal effort. (Petitioner's appendix pp. 22-23).

The Florida Supreme Court did not hold that state regulation was preempted by the federal regulatory activity. Instead, the lower court merely held that the state regulatory scheme was unnecessary and did not provide any protection against diversion not already provided by the comprehensive federal regulation. This holding is totally consistent with Epstein v. Lordi, supra, and is an application of the traditional Commerce clause test.

Similarly, the cases relied upon by Petitioner are clearly distinguishable and do not require or even suggest that the Florida Supreme Court should have reached a different result. In both Duckworth v. Arkansas, 314 U.S. 390 (1941), and United States v. State Tax Commission of Mississippi, 412 U.S.

363 (1973), this Court merely recognized that a state may, in the absence of conflicting regulation, properly exercise its police powers to regulate and control shipments of liquor through its territory insofar as necessary to prevent the unlawful diversion of liquor into the internal commerce of the state. The present decision of the Florida Supreme Court is consistent with this concept as the present court held that the state's regulatory activity was not reasonably necessary to guard against diversion.

Thus, since the Florida Supreme Court did not hold that state regulation was preempted by the federal regulatory activity, Petitioner's second reason for granting the Writ is without merit. The decision of the lower court in this case is consistent with the reasoning and holding of Epstein v. Lordi, supra, and was grounded on the traditional Commerce Clause test of whether the state regulation constituted an unreasonable burden on interstate commerce. Since Petitioner can point to no prior decision of this Court which conflicts with the lower court's decision in the present case, and since the lower court has correctly applied the Commerce Clause test as set forth in earlier decisions of this Court, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons and authorities set forth in this brief, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GIBBONS, TUCKER, McEWEN,
SMITH, COFER & TAUB
A Professional Association

Robert V. Williams

ROBERT V. WILLIAMS, ESQUIRE
606 Madison Street
Post Office Box 1363
Tampa, Florida 33601
(813) 228-7841